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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re)
)
Amendment of the Commission's Rules) WT Docket No. 97-82
Regarding Installment Payment)
Financing for Personal Communications)
Services ("PCS") Licensees)
Installment Payment Restructuring)

To: The Commission

PETITION FOR RECONSIDERATION

CONXUS Communications, Inc. ("CONXUS"), by its attorneys and pursuant to FCC Rule Section 1.429, petitions for reconsideration of the Commission's *Second Report and Order and Further Notice of Proposed Rule Making*, FCC 97-342 (October 16, 1997), 62 Fed. Reg. 55375 (October 24, 1997 ("C Block Order")) in the above-referenced proceeding, and shows the following:

1. CONXUS is implementing a nationwide narrowband Personal Communications Service ("PCS") system on its five regional 50/50 KHz narrowband PCS channels which will provide the public advanced two-way messaging service. Its product is a portable, wireless "answering machine" or "voice mail" device called "Pocket Talk." It is an economical means for voice messaging with an acknowledgement feature by which the sender will know whether the message was received. CONXUS currently has several major markets constructed and has commenced commercial operation in South Florida and Washington, D.C. Based upon progress to date, CONXUS will complete its five year buildout requirements in 1998, one and one-half years ahead of schedule, and is forecasting that it will

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complete its 10 year buildout requirements in 1999, a full five years ahead of schedule.

2. CONXUS acquired its five regional 50/50 KHz narrowband licenses through competitive bidding.^{1/} In addition, CONXUS holds 24 900 MHz Specialized Mobile Radio ("SMR") Major Trading Area ("MTA") licenses, also acquired through competitive bidding.^{2/} CONXUS, therefore, currently has quarterly installment payments which it must make to the Treasury like the C block broadband PCS licensees. CONXUS understands the concerns C block licensees have in regard to raising capital to make their installment payments while also constructing and marketing their systems in competition with larger, better financed, well established telecommunications companies. Like the C block broadband PCS licensees, CONXUS has encountered difficulties in raising capital and has itself had to cancel two financing offerings -- one equity offering in early 1996 and one high yield offering in late 1996. Similar to the C block licensees, CONXUS is financing a multimillion dollar obligation to the government and implementing a system which will incur infrastructure costs of several hundred million dollars. CONXUS,

^{1/} As a minority/female owned small business ("Designated Entity") CONXUS was afforded certain financial benefits in acquiring its licenses, including installment payment treatment.

^{2/} In the 900 MHz SMR auction, CONXUS was eligible for installment payment treatment based on its status as a small business.

CONXUS also holds several 900 MHz SMR Designated Filing Area ("DFA") licenses which were purchased from incumbent licensees.

therefore, competes in the financial markets for capital with the broadband PCS licensees.

3. Because it competes in the consumer and financial markets with Broadband PCS entities, CONXUS has in this proceeding, asked for only one thing: to be afforded equal treatment to the broadband PCS Licensees.^{3/} Because the *C Block Order* fails to treat narrowband and broadband PCS similarly, CONXUS seeks reconsideration of that order so that the Commission may modify it to afford similar relief to narrowband PCS entities. Moreover, whatever additional relief may on reconsideration be afforded the C block licensees in connection with their installment payment obligations, such relief must also be afforded narrowband PCS Designated Entity licensees.

4. The *C Block Order* offered cash-strapped C block licensees the following four alternatives from which they must select by January 15, 1998: (1) maintain its existing note obligations, making its next payment by March 31, 1998, and make payments which have accrued since the March 31, 1997 payment suspension in equal amounts over eight quarterly payments; (2) dis-aggregate one-half of its spectrum (15 of 30 MHz) for any or all of its licenses and return such spectrum to the Commission for re-auction with a proportionate amount of its debt forgiven, but with 50 percent of

^{3/} It is an elementary principle that the Commission must treat similarly situated parties alike or provide an adequate justification for the disparate treatment. See *Adams Telecom, Inc. v. FCC*, 38 F.3d 576, 581 (D.C. Cir. 1994); *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1365 (D.C. Cir. 1993); *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965).

its down payment retained by the Commission; (3) return all of its licenses in exchange for cancellation of its debt with a forfeiture of the entirety of its down payment;^{4/} or (4) prepay "at face value" all of its BTA licenses held within any MTA(s), surrendering any licenses not prepaid with cancellation of the debt for such surrendered licenses and a loss of 30 percent of the down payments made on those surrendered licenses.

5. Although these options have at least some degree of utility for broadband licensees, with the exception of the first option, they have no utility for narrowband PCS entities. Only option one, maintaining the scheduled installment payments, while affording a two-year period to make up one year of deferred payments, would be applicable to CONXUS.^{5/} The other three options

^{4/} Licensees are not required to return any license for which they have met the five year build-out requirement by September 25, 1997.

^{5/} On April 10, 1997, CONXUS requested the Commission to modify its installment payment plan to an annual basis in line with the requests of broadband PCS licensees. See Letter to Daniel Phythyon, Exhibit I, hereto. On June 26, 1997, CONXUS requested the Commission to approve a six month grace period during which CONXUS would not be required to make installment payments while the C block restructuring issue was being decided. See Exhibit II, hereto. The Commission has not to date acted on either request. Pursuant to its request for a grace period, CONXUS has not made installment payments due since March 31, 1997. In accordance with fundamental principles of equal treatment, and subject to whatever other action the Commission may take on reconsideration of this proceeding, CONXUS requests that the Commission confirm in its reconsideration decision, herein, that CONXUS and similarly situated narrowband PCS licensees will be accorded the same two-year period over which to pay interest and principal which have accrued since the suspension of CONXUS's installment payments, with payments to begin on March 31, 1998. This will, inter alia, allow CONXUS to take advantage of the more liberal foreign investment limitations resulting from the WTO.

simply would not apply to CONXUS's situation. With only a total of 100 KHz, CONXUS could not dis-aggregate its spectrum and still provide its narrowband PCS service. Nor could CONXUS turn in one or more of its narrowband PCS regional licenses for credit toward pre-payment of its installment debt on its remaining licenses, as this would destroy its ability to provide nationwide narrowband service, a key component of its business plan. Finally, the amnesty option is not applicable to an entity such as CONXUS which has already constructed facilities and commenced (either commercial or pre-commercial) operations in markets within each of its licensed regions.

6. The *C Block Order* offers no reason for failing to grant any relief to narrowband entities while granting such relief to the C block. Given CONXUS's showing that its nationwide buildout costs are comparable to the costs of building out a regional wideband PCS system, that CONXUS's installment debt is equal to or greater than that of 90 percent of the PCS C block bids, and CONXUS's showing that it competes in the financial and consumer markets with wideband PCS licenses, it was error not to afford to CONXUS treatment comparable to that afforded C block licensees. Accordingly, CONXUS requests the Commission reconsider its decision

and grant it relief comparable to that adopted in this proceeding for broadband PCS entities.

Respectfully submitted,

CONXUS COMMUNICATIONS, INC.

By: 

Gerald S. McGowan
George L. Lyon, Jr.
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April 10, 1997

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OFFICE OF GENERAL COUNSEL

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Daniel Phythyon, Esquire, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Washington, D.C. 20554

Re: Request For Modification Of Installment Payment
Obligations From Quarterly To Annual Payment Schedule

Dear Mr. Phythyon:

CONXUS Communications, Inc., by its counsel, hereby requests reformation of its Installment Payment Plan to modify its existing installment payment obligations by moving from a quarterly to an annual payment schedule.¹ The public interest benefits of the requested reformation by June 29, 1997, the final date upon which interest and principal payments due March 31, 1997 for Narrowband PCS licensees must be made.²

¹ The requirement that Narrowband PCS licensees tender installment payments on a quarterly basis is not set forth in the Commission's rules. Rather, it is created by the Installment Payment Plans of each licensee. For this reason, no waiver of the Commission's rules is necessary to implement the instant request. Instead, the Commission may simply reform the terms of the Installment Payment Plan.

To the extent the Commission determines a waiver is required, CONXUS herein requests the Commission to deem this letter a Petition for Waiver of its installment payment rules. As demonstrated in this letter, a waiver would serve the underlying purpose of the Commission's installment payment rules and would serve the public interest, as required by 47 C.F.R. § 24.419(a)(1).

² If granted, CONXUS requests that the relief afforded it be granted to other similarly situated Narrowband PCS carriers.

Over the past several years, the Commission has pursued an aggressive spectrum assignment agenda -- conducting 12 auctions to assign some 3,651 FCC licenses. Consistent with its Section 309(j) obligations,³ the Commission reserved a number of these licenses for small businesses and entrepreneurs.⁴

Since the Commission initially formulated competitive bidding rules for small businesses and entrepreneurs, the financial and regulatory climates in which such licensees operate have changed fundamentally. Some changes are positive, such as the Commission's willingness to revise its rules to remove unnecessary impediments to rapid facilities-based competition. Some changes are the direct result of the increasingly competitive marketplace. That is, all new entrants must construct their licenses quickly to maintain their competitiveness.⁵ This market-driven buildout acceleration greatly benefits consumers but strains new entrants, whose challenge is further complicated by an increasingly cautious domestic investment climate.⁶ In all, small businesses and entrepreneurs experience acutely the effects of these changed circumstances. For this reason, reformation of the Installment Payment Plan is entirely appropriate.

With the influx of new wireless competitors and the recent launch of new PCS networks, financial investors are fully occupied

³ 47 U.S.C. §§ 309(j)(3)(B) and (4)(D).

⁴ Small businesses have been awarded nearly 50 percent of the licenses issued through competitive bidding by the Commission. See *Statement of Reed E. Hundt, Chairman, Federal Communications Commission, on Spectrum Management Policy*, before the Subcommittee on Telecommunications, Trade, and Consumer Protection, Committee on Commerce, U.S. House of Representatives (Feb. 12, 1997).

⁵ The Commission has reported wireless infrastructure investment in 1996 alone to be in excess of \$26 billion. See, e.g., Keynote Address of Michele C. Farquhar before the Telecommunications Reports, "Next Generation Wireless" Conference (Feb. 13, 1997) (Reporting that wireless investment, employment and subscribers all have increased by more than 100 percent in 1996).

⁶ The financial markets have been inundated with competing requests for funding for telecommunications ventures. By the end of 1996, a record number of new telecommunications equity offerings had emerged. Concomitantly, investors increasingly scrutinize wireless carriers' ability to successfully adjust to the new era of wireless competition. See, e.g., "A Meeting With Reed Hundt," *Bensche-marks*, vol. 97-04 (Feb. 24, 1997) (reporting that "the money pool for the C-Block was extremely tight").

assessing the financial effects of these new wireless services in a rapidly changing telecommunications environment. Given the inherent volatility and seasonal nature of the capital markets, modification of the installment plan to provide for annual payments will provide small businesses with greater flexibility to time their fund raising activities around favorable market conditions or when competition for funding is less congested. It also will give small businesses additional flexibility to take advantage of the benefits that are expected to arise out of the recent WTO Agreement.

The public interest benefits of reforming the Installment Payment Plan is significant. Most important, such changes will help ensure competition from new entrant small business and entrepreneur carriers. As the Commission intended when structuring installment payments, new wireless entrants are emerging and are poised to provide an innovative range of price and service competition. Modifying the Installment Payment Plan will fuel these efforts and further expand job creation in the wireless industry by permitting carriers immediately to concentrate their scarce capital resources toward infrastructure buildout.

A greater immediate capital allocation toward auction payments necessarily diminishes the resources available for infrastructure development and job creation. The deferral and revision of installment payment obligations, as proposed herein, would serve the public interest by permitting licensees to focus on the establishment of the telecommunications infrastructure necessary to provide competitive wireless service. This would facilitate a quicker time-to-market for small business licensees, which would in turn allow them to start generating revenues from their deployed infrastructures at an earlier time. In addition, it would help mitigate any time-to-market infrastructure deployment advantage that may exist among narrowband licensees.

Moving from a quarterly to an annual payment schedule is a modest reformation of the Installment Payment Plan. It conforms to the simple annual interest calculation on which existing payments are based, and it keeps the government whole in terms of the amount of funds collected from each licensee. Granting the request would not reduce the amount any licensee would pay. Under this proposal, the total amount of interest paid into the U.S. Treasury annually would remain unchanged from the amounts currently specified in the Commission's Installment Payment Plans. The proposal merely defers for one year the date on which each licensee's next scheduled installment payment is due, with subsequent installments to be paid thereafter on an annual basis.

Reformation of the Installment Payment Plan is entirely consistent with Congress's directives and the Commission's actions governing small businesses. Both Congress and the Commission recognize the utility of federal efforts to enable small businesses to enter new markets and provide new services. In addition to

Section 309(j), Congress recently passed federal legislation designed to address the needs of small businesses.⁷ Among other things, the Small Business Fairness Act requires federal regulatory agencies to monitor and respond to the needs of small businesses. Similarly, Section 257 of the Communications Act⁸ requires the Commission to identify and eliminate market entry barriers for small businesses. CONXUS's proposal is entirely consistent with this legislation because it addresses directly the chief barrier recognized by the Commission: access to the capital markets.

The Commission, too, has begun to implement its statutory obligation to reduce market entry barriers for small businesses through its *Notice of Inquiry*.⁹ The Commission also recently recognized the promotional impact of installment payment programs for entrepreneurs and small businesses.¹⁰ In recognition of the critical nature of installment payment schedules to the ultimate competitiveness of small businesses and entrepreneurs, the Commission sought comment on the appropriate schedule of installment payment terms for general application.¹¹ The Commission's experience with installment payment programs likely influences its contemplation of wholesale revision of its installment payment rules. However, the prospective nature of the Commission's proposed action renders the existing installment payment programs less than optional for existing licensees. This, in turn, counsels toward reformation of existing debt arrangements for current licensees.

On March 31, 1997, the Chief, Wireless Telecommunications Bureau released an order, DA 97-149, acknowledging that certain C and F Block wideband PCS licensees have requested the Commission to

⁷ See, e.g., Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996), codified at 5 U.S.C. § 601 et seq.. See also 47 U.S.C. § 257.

⁸ 47 U.S.C. § 257.

⁹ *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, 11 FCC Rcd 6280 (1996).

¹⁰ *Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding*, WT Docket No. 97-82, Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 97-60 at ¶ 32 (Feb. 28, 1997) ("[I]n installment payments have been utilized as a means of assisting small entities that are likely to have difficulty obtaining adequate private financing"). See also *id.* at ¶ 34 ("[W]e seek comment on ways that we could refine our installment payment plans to streamline without reducing benefits to small businesses").

¹¹ *Id.* at ¶ 36.

Daniel Phythyon, Esquire
April 10, 1997
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adopt annual installment payments for wideband PCS Block C and F licensees, and suspending the March 31, 1997 deadline for installment payments for all broadband PCS licensees pending action on that request. Petitioners here suggest that suspension of narrowband installment payments is likewise appropriate.

For these reasons, CONXUS requests expedited action in reforming its Installment Payment Plan with the Commission to modify existing installment payment obligations by moving from a quarterly to an annual payment schedule. CONXUS respectfully request that this action be taken before June 29, 1997, the final date on which the March 31, 1997 payment may be made without default.

Respectfully submitted,



George L. Lyon, Jr.
Attorney for CONXUS Communications, Inc.

Exhibit II

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June 26, 1997

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Re: **CONXUS Communications, Inc.**
Request for Grace Period for Payment of Installment Obligations

Dear Ms. O'Brien-Ham:

CONXUS Communications, Inc. ("CONXUS"), pursuant to Section 1.2110(e)(4)(ii) of the Commission's rules and regulations ("FCC Rule Section 1.2110(e)(4)(ii)") and by counsel, respectfully requests that the Commission approve a grace period of six months from June 30, 1997 in which CONXUS will not be required to make any installment payments connected with its narrowband PCS licenses commencing with payments due since March 30, 1997.

The Commission's rules contemplate that a request pursuant to FCC Rule Section 1.2110(e)(4)(ii) will be made because the licensee has not made its required installment payment within the automatic 90 day grace period or it recognizes that it will be unable to make such payment. CONXUS, however, seeks this relief to defer making quarterly installment payments until the Commission has made a decision on CONXUS' request to reform its installment payments from a quarterly basis to an annual basis.¹ CONXUS' request for reformation is consistent with the requests for relief filed by a number of C

¹ See Letter to Daniel Phythyon, Acting Chief, Wireless Telecommunications Bureau dated April 10, 1997 from Gerald S. McGowan and George L. Lyon, Jr., Lukas McGowan Nace & Gutierrez, Counsel for CONXUS.

and F block broadband PCS licensees in connection with the terms of their installment payments obligations.

CONXUS understands that until an overall policy decision by the Commission is rendered in regard to the issues associated with the broadband PCS licensees requests for modifications to the terms of their installment payment obligations, CONXUS' request also will not be acted upon by the Commission. The Wireless Telecommunications Bureau ("Bureau") suspended all C and F block broadband PCS licensees' obligations to make any required installment payment due on or after March 30, 1997 until the Commission had an opportunity to consider the issues related to the C and F block broadband PCS licensees' request and a decision is adopted on such requests. CONXUS seeks the same relief by virtue of the authority granted to the Commission, pursuant to FCC Rule Section 1.2110(e)(4)(ii), to afford a licensee a grace period on its installment payment obligation for a period of six months.²

CONXUS, in its request to reform its installment payments, has made a showing similar to that provided by the C and F block broadband PCS licensees. CONXUS contends that Designated Entity narrowband PCS licensees and C and F block broadband PCS licensees are similarly-situated.³ The two PCS services provide or will provide, in part, the same services, i.e., wireless voice messaging; target the consumer by mass marketing; have substantial capital requirement to finance the implementation of their systems; and are accessing the same capital fund pool. Affording more favorable regulatory treatment to one of these PCS service licensees to the exclusion of the other PCS service provider, i.e., providing better terms on installment payment obligations, is contrary to the Congressional mandate of "regulatory parity" among CMRS providers which furnish the same or similar services.

Similarly-situated licensees must be treated the same, unless the Commission is able to adequately justify such difference in treatment.⁴ CONXUS, therefore, submits

² FCC Rule Section 1.2104(e)(4)(ii) also provides that "the Commission [may] grant[s] a request for a grace period, or otherwise approves a restructured payment schedule" Inasmuch as the timing of an installment payment, i.e., quarterly or annually, is not set by the FCC's rules, CONXUS submits that FCC Rule Section 1.2104(e)(4)(ii) permits the Commission to authorize CONXUS' request to change the timing of its installment payment obligations in the same manner as the Commission may grant a grace period.

³ Copies of various pleadings filed by CONXUS which argue the similarities between the two PCS services are provided as support for this position.

⁴ See Adams Telecom, Inc. v. FCC, 38 F.3d 576, 581 (D.C. Cir 1994); McElroy Electronics Corp. v. FCC, 990 F.2d 1351, 1365 (D.C. Cir. 1993); see Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C. Cir. 1965).

that, until the issues relating to reformation of installment payments have been considered and resolved, there is no basis on which the Bureau may distinguish the difference in the treatment between the C and F block broadband licensees and CONXUS while each of their requests are pending. The Bureau provided relief to C and F block broadband licensees that have not requested relief and have not demonstrated that they face the same financing difficulties on which the initial broadband PCS request relied. CONXUS submitted a request in which it raised the same issues as the initial broadband PCS request and yet no relief has been accorded CONXUS while its request is decided. CONXUS contends that there is no reasonable rationale which would warrant this difference in interim treatment between the two PCS service providers.

Requiring CONXUS to make its installment payments during the pendency of its requests defeats the purpose of filing the request and is contrary to the public interest. The Commission's action on CONXUS' request is rendered meaningless if CONXUS is forced to pay the very installment payments from which it seeks relief.⁵ The public interest may be harmed by requiring CONXUS to make its installment payments prior to consideration and action on its request for reformation. CONXUS' initial plans to roll-out its nationwide system has been inhibited by the lack of equipment availability necessary to construct and implement the system⁶ and the difficulties associated with raising in excess of \$500 million of new capital to implement the system.⁷

Nevertheless, even with the equipment delivery delays, CONXUS will have a commercial system which will cover a number of the major markets operating as of September 1, 1997. CONXUS has made two year of installment payments, even though it had no viable means to commence commercial operations and generate revenue. CONXUS has paid the U.S. Treasury over \$29,000,000 (which includes the 20% down payment of its net aggregate winning bid). CONXUS is not seeking any relief that has not or will not be provided the C and F block licensees. The Commission's decision on

⁵ See New England Mobile (DA-492), (Pri.Rad.Bur., 1990).

⁶ Between February 1995, when CONXUS was issued its operating licenses, and January 1997, there was no equipment available to construct the infrastructure to initiate service on any portion of its nationwide system. Motorola, the only manufacturer of the equipment which is necessary to implement CONXUS' voice mail offering, promised the equipment soon after CONXUS narrowband PCS licenses were grant. However, due to technology problems, the equipment was not commercially available until January 1997.

⁷ CONXUS, like the entrepreneurial broadband PCS licensees, has not been completely successful in its offerings in the capital markets. It has had to pull two equity offerings in the aggregate amount of approximately \$200 million. Its most recent equity offering, while successfully completed in May 1997, was scaled back from the amount that CONXUS initially wished to raise.

the installment payment reformation issue will have an impact on CONXUS' continued ability to service its debt financing with the government and expand service to the public.⁸ Thus, it is imperative that the Commission favorably consider this request for a grace period.

For the reasons set forth herein, CONXUS requests that the Commission grant a six-month grace period in which CONXUS will not be required to make any installment payment due on or after March 30, 1997.

Respectfully submitted,

CONXUS Communications, Inc.

By: _____

Gerald S. McGowan
Terry J. Romine

cc: Daniel Phythyon, Chief, WTB
Jonathan Cohen, Assoc. Chief, WTB
Regina Dorsey, Billing & Collections

⁸ Should the Commission wish to review, on an in camera, confidential basis, information which reflects the extent of existing construction and implementation of CONXUS' nationwide system, the financial condition of the company, and the affect of the requested deferral on the financial condition of the company, CONXUS would be happy to produce such information.